

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 804 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

PARESH VALJIBHAI TALA

Appearance:

1. Criminal Appeal No. 804 of 1990
MR KC SHAH, APP, for the appellant.
MR MJ BUDDHBHATTI for Respondent.
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CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 11/09/98

ORAL JUDGEMENT

1. The state of Gujarat has preferred this appeal against the judgment and order passed by the learned Judicial Magistrate, First Class, Kalavad, in Criminal Case No.68 of 1989, on 16th June, 1990, recording acquittal of accused-present respondent for offence punishable under Sections 409, 403 and 381 of the Indian Penal Code, with which he was charged.

2. The facts of the case are that the accused-respondent was working as Secretary to the Kalavad Nagar Panchayat around December 1986. Some purchases of PVC pipes were made by the Panchayat around that time and were kept at Balambhadi Pump House. Out of that stock, 35 pieces of PVC pipes, one piece of galvanized pipe and several other pieces of PVC pipes were illegally appropriated by the accused-respondent to his personal use by installing the same for agricultural purpose of a Wadi belonging to his father. The whole charge came to be investigated on basis of an anonymous application claimed to have been received somewhere in 1988. Investigations were started and, ultimately, having found sufficient evidence against the accused, report under Section 173 of the Code of Criminal Procedure was made. Upon the matter coming up for hearing, the accused-respondent was charged for offence punishable under Section 403, in the alternative Section 381 and, in the alternative, Section 409 of Indian Penal Code. The accused-respondent pleaded not guilty and expressed his desire to face the trial.

3. After considering the evidence on record, the learned trial Magistrate came to the conclusion that the prosecution has not been able to prove the case against the accused and, therefore, the accused-respondent came to be acquitted of the offences with which he was charged.

4. Mr. K.C. Shah, learned Additional Public Prosecutor, appearing for the appellant-state submitted that although the recovery of the muddamal is not properly proved by the prosecution, as the Panch witnesses have turned hostile, there is sufficient evidence in nature of depositions of police witnesses to establish the guilt of the accused, which is wrongly not accepted by the learned trial Magistrate. Drawing attention to several aspects of the prosecution case, Mr. Shah submitted that the appeal may be allowed setting aside the judgment and order of acquittal and the respondent may be convicted for the offences with which he is charged.

5. Mr. J.M. Buddhbhatti, learned advocate appearing from Mr. M.J. Buddhbhatti, for the respondent, has drawn attention of this Court to certain salient features of the case. He has submitted that the recovery of the PVC or galvanized pipes in question is not properly proved. Panch witnesses have not supported the recovery. The whole investigation is conducted in an

unusual manner. To put it into his words, the cart is put before the horse. According to him, before the F.I.R. came to be lodged, the statements were recorded and the recovery was made, and no investigation is done after the F.I.R. is lodged. The statements, which are recorded, are all signed by the concerned witnesses and the basis of the entire investigation - the anonymous complaint - has not come on record in one piece. Only second page of that complaint is produced on record. The first page is missing and the subsequent page is also not produced. No explanation is advanced by the prosecution for this. Mr. Buddhbhatti, therefore, submitted that when an accused is accused of such serious offence, the charge against him must be proved with independent, cogent and reliable evidence. Mr. Buddhbhatti also drew attention of this Court to the fact that the prosecution has failed to establish the identity of the allegedly misappropriated muddamal. There is no evidence to show that the muddamal that is recovered from the accused belonged to the Nagar Panchayat or that it is the same muddamal that was purchased by the Nagar Panchayat and kept at Balambhadi Pump House. He, therefore, submitted that the decision of the learned trial Magistrate is just, legal and proper and may not be interfered with.

6. This Court is taken through the record and proceedings, the relevant portion of the evidence and the judgment by the learned Additional Public Prosecutor, Mr. Shah. The first witness that the prosecution has examined is Valji Chakubhai, father of the accused, at Ex.13. He does not support the prosecution case and denies that galvanized pipe 20 feet in length and PVC pipe 35 feet in length were newly installed by him. Next witness is Vinod Valji, Ex.14, brother of the accused. He also does not support the prosecution case. Witness-Ratilal Babubhai, Ex.15, has also turned hostile to the prosecution. Witness-Jivraj Valji, Ex.16, also not supported the prosecution case. Witness-Rama Samat, Ex.17, says that the police had taken him to the Wadi of Valji Chakubhai for removal of pipeline and he was paid wages by the police. Barring this, this witness throws no light as to the type, nature or quality of the pipeline that was removed. Same is the case with witness Magan Mulji, Ex.18, Kara Lakhman, Ex.19, Gordhan Ratna, Ex.20 and Batuk Tapu, Ex.21. Witness-Mamad Ibrahim, Ex.22, says that the accused had come to the Pump House and told him that a tractor is to follow and when the tractor came, he loaded PVC pipes therein 36 in number and he had loaded one galvanized pipe. He states that he has no knowledge as to where the pipes were taken. During cross-examination, he admits that, normally, the

store of the Nagar Panchayat is kept at the Pump House and the pipes are taken away as and when they are required for official use. He says that whenever some such goods are taken away, an entry in this regard is made by the person who takes away the goods in a register maintained by the Overseer. Witness-Jiva Chakubhai, Ex.23, was an employee of the Nagar Panchayat. He says that, he had seen the tractor of Harubha being loaded with pipes and he had also himself loaded some of the pipes. He says that removal of these pipes was intimated to the Overseer and entry was made in this regard. This part of his deposition seems to be an improvement, as can be seen from his cross-examination. He, of course, admits that many of the Panchayat people were taking away such stock from him. Witness-Harubha Abesinh, Ex.24, says that he is plying his tractor on hire. He says that the accused had called him at the Panchayat office and had asked him to take the tractor to the pump site. He went to the pump site. Mamadbhai was there. Then Jivabhai came. Accused-Pareshbhai told Mamadbhai to load the pipes. Then he was asked to take those pipes to the office. Thereafter, he was directed to go to Khathiya where father of the accused was present. He had unloaded the pipes and he was paid Rs.300/- as freight. During cross-examination, he states that he does not maintain a log book. He has never disclosed earlier to anyone that he had taken the pipes to Khathiya. He admits that police had obtained his thumb impression on his statement. His tractor was seized by police and, ultimately, was released by the order of the Court. The other witness-Prafulchandra Chhotalal Mehta, Ex.25, is the President of the Nagar Panchayat. He says that the A.S.P. had called him and told him that the Secretary has misappropriated some pipes from the Panchayat, to which he pleaded ignorance. He says that thereupon, he had called for explanation of the accused-respondent as well as other concerned employees. During cross-examination, he admits that there is stock register maintained by the Panchayat relating to the pipes, etc. He denies that the accounts of the Panchayat are audited every year. But then he states that the accounts are audited, per convenience, every year or in two years. Next witness is Abdulkadar Noormohmad, Ex.29. He was working as Overseer with the Kalavad Nagar Panchayat. He has proved the entry regarding despatching of PVC pipes on 16th December, 1986, but has pleaded ignorance about the purpose for which the pipes were taken away. He states that he had not seen any PVC pipes at the police station. He also admits that broken pipes are auctioned. He admits that entry regarding the taking of the pipe by accused-respondent is not made. He says that the entry

is made on 29.11.1986 and then hurriedly volunteers that they used to make such entries according to their convenience.

7. Thereafter, certain witnesses are examined, but, ultimately, D.S.P., Bhavnagar, who was, at the relevant time, i.e. in 1988, A.S.P., Jamnagar, is examined at Ex.37. He says that he had received an information on 12th October, 1988, informing about the misappropriation of PVC pipes and galvanized pipe by the accused. He, therefore, had gone to Kathiya and interrogated father of the accused regarding the pipes that were found over there. The father of the accused made certain statements before him and, ultimately, it was found that he did not have any bills for the purchase of those pipes. Then the Panch witnesses were called. Pipes were dug out and recovered. Panchnama of recovery is proved through this man as the Panchas have not supported. The F.I.R. that is brought on record, at Ex.39, is also brought on record through deposition of this witness.

8. An overall view of this evidence, if taken, the first factor that attracts the attention of this Court is that the F.I.R., which is given by A.S.P. Patadiya, is dated 22nd October, 1988, whereas the Panchnama of recovery is dated 14th October, 1988. It also transpires from his deposition that he had recorded statements around the time when the Panchnama was made, i.e. before lodging of the F.I.R. and it is not the case of the prosecution that any investigation was carried out subsequent to the lodging of the F.I.R.. The factum of F.I.R. being lodged subsequent to the investigation has also revealed from the fact that the Panchnama, Ex.38, bears no mention of the registration of offence and the Crime Register number.

9. The main defect in the prosecution case is that the identity of muddamal is not established. The muddamal which is alleged to have been misappropriated by the accused respondent and found from the Wadi or field of his father is not shown by an iota of evidence to be the same as which is asserted to have been despatched from the godown of the Panchayat. No inference can be drawn that the pipes which are recovered from the field of the father of the accused are the same that were despatched from the store of the Panchayat. The witness who claims to have taken those pipes from the stores to the field of the father of the accused was not shown the pipes in question either during the course of investigation or during the course of the trial. It cannot be overlooked that the entry regarding the taking

of pipe by accused-respondent is not made as per admission of witness-Abdulkadar Noormohmad, Ex.29. As a result, the misappropriation alleged against the accused cannot be said to have been proved.

10. Another defect that also calls for consideration is that the anonymous application which is the basis of investigation is not produced on record in one piece. Only a part of that application is produced. Only the second page is produced. The first and the subsequent pages, after page No.2, are not produced on record. The F.I.R. that is produced on record at Ex.39, in fact, cannot be considered as F.I.R. It seems to be only a formality performed by the Investigating Officer, which he thought necessary to do and, therefore, the outcome is that investigation has started before registering the offence and there is no investigation after the offence is registered. With all these defects in the investigation, the risk of accepting the nexus between accused-respondent and the offence cannot be taken and the learned Magistrate has rightly acquitted the accused-present respondent. The decision of acquitting the accused cannot be said to be illegal, erroneous or palpably unsustainable and does not call for any inference in this acquittal appeal. The appeal is, therefore, found to be devoid of merits and is dismissed.

[A.L. DAVE, J.]

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